Before the
Federal Communications Commission
Washington, DC 20554

DRAFT FOR COMMENT

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
	)	

Comments of the
Software & Information Industry Association (SIIA)
on the Further Notice of Proposed Rulemaking

The Software & Information Industry Association (SIIA) appreciates this opportunity to comment in response to the above captioned proceeding.

As the principal trade association of the software code and information content industry, the 600 members of SIIA develop and market software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. Our membership consists of some of the largest and oldest technology enterprises in the world as well as many smaller and newer companies.

These comments are the first that SIIA has filed with the Federal Communications Commission (FCC) in response to this proceeding. Our comments reflect our experience, however, in participating in the Federal Trade Commission's (FTC's) rulemaking proceeding amending its Telemarketing Sales Rule (TSR) and establishing a national "Do-Not-Call" Registry. During the FTC's rulemaking process, SIIA provided formal comments on the proposed amendments to the TSR,[1] testified at its June 2002 workshop,[2] and worked with the Congress[3] to pass the Do-Not-Call Implementation Act[4] (Do-Not-Call Act).

As requested by the FCC in its Further Notice of Proposed Rulemaking (FNPR), SIIA addresses separately the distinct issues relating to a national do-not-call list and

---

[1] See, e.g., Letter to FTC on Proposed Changes to TSR, April 9, 2002 (found at: http://www.siia.net/govt/issues.asp).
[2] See Agenda for TSR Rulemaking Forum (found at: http://www.ftc.gov/bcp/workshops/tsr/agenda.htm).
[3] Letter of SIIA President Ken Wasch to House Energy & Commerce Chairman Billy Tauzin in support of a National Do-Not-Call Registry, January 16, 2003 (found at: http://www.siia.net/govt/issues.asp).
[4] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).

those relating to the FCC's current rules implementing the Telemarketing Consumer Protection Act (TCPA)[5] in contrast to the FTC's TSR.

Create a Single National Do-Not-Call Registry That is a One-Stop Resource for Consumers, Businesses and Consumer Protection Authorities

SIIA urges the FCC to abandon its current approach of relying on company-specific do-not-call lists. Instead, the FCC should take the necessary actions to establish a single national Do-Not-Call Registry working in full cooperation with the FTC. In our view, this national Registry must also replace and absorb the operations of state do-not-call lists. Whatever the merits of a company-specific approach were ten years ago, the reality is that the FTC's action has superceded any benefits that a decentralized approach had in promoting confidence among all stakeholders. There are a number of benefits to this approach.

First, and foremost, a single national registry is in the consumers' interest. Consumers will need only register once to avoid receiving telemarketing calls. A single, national do-not-call registry will eliminate consumers' uncertainty about whether they need to register with one or multiple lists. A single approach avoids requiring consumers to keep track of different registration processes and when their registrations need to be renewed.

Second, a single national registry is in the interest of business users. A consolidated approach will relieve businesses that engage in telemarketing from the burdens and costs of seeking to comply with duplicative and overlapping procedures, and in some cases, fees. It is important to note that the Rules apply to businesses that are not necessarily characterized as telemarketers. The members of SIIA are in the business of providing software and information products. In doing so, they use telemarketing as a channel of communication for new products, upgrades, alerts and related services. Thus, our need for a unified list is inherent in the fact that telemarketing is *incidental* to our members' core businesses; yet the costs of complying with a myriad of approaches remain undiminished.

Third, a single national registry that absorbs state do-not-call lists would prove more efficient to administer and would eliminate the difficulties that the FCC would otherwise encounter in trying to coordinate state-administered lists.[6] The maintenance of multiple lists by different states strains state budgets and is, in effect, a tax to fund

[5] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Notice of Proposed Rulemaking and Memorandum Opinion & Order, 17 FCC Rcd 17459, CG Docket No. 02-278 and CC Docket No. 92090, para. 11. [Hereinafter cited as FCC NPRM]

[6] We note that such coordination is required under Section 227(e)(2) of the TCPA.

duplicative regulatory regimes. Moreover, if the FCC created a national do-not-call list without clarifying that the single national registry preempts and absorbs state lists, the FCC would then have to spend substantial resources to ensure coordination with state lists.[7]

In our view, in exercising its discretion under the TCPA to establish a national do-not-call registry, the FCC also has the authority to act to preempt and absorb state do-not-call lists. As a general matter, the effect of the Communications Act of 1934 (Communications Act) is to preempt state regulation of interstate communications unless specifically provided for in state rule or regulation. The TCPA was enacted consistent with this broad authority of the FCC, and Congress expressly amended Section 2(b) of the Communications Act to ensure that the FCC's authority would not be undermine by state regulation in this area. In addition, Section 227(e)(2) of the TCPA provides that "if … the [FCC] requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list or listing system that does not include the part of such single national database that relates to such State."[8] Thus, Congress intended that, in the event the FCC authorizes a national do-not-call list, a state must enforce its do-not-call obligations by requiring use of the segment of the list that pertains to that state rather than a separately maintained list. As a result, SIIA believes that the establishment of a national do-not-call registry would preempt state do-not-call lists with respect to both interstate and intrastate telemarketing.

Moreover, the burden of harmonizing the national do-not-call registry with the operations of the more than thirty states that have established do-not-call lists means that, as a practical matter, the only way to ensure that the statutory mandate of Section 227(e)(2) of the TCPA will be satisfied is to eliminate state do-not-call lists and replace them with a single national do-not-call registry. Thus, SIIA believes that state do-not-call statutes should be preempted by the TCPA under established Communications Act jurisdictional principles, which recognize that state regulation may not encroach substantially on the Commission's authority under the Communications Act or frustrates the Commission in its exercise of jurisdiction over interstate and foreign communication services. *See* North Carolina Utilities Com. v. Federal Communications Com., 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (FCC acted reasonably when it ruled that state regulatory agencies could not adopt regulations to restrict or prohibit the interconnection of customer-provided equipment to telephone facilities that were used for both interstate and intrastate communications). At a bare minimum, however, SIIA urges

[7] The FCC's task would be doubly difficult in light of the approach taking by the FTC to coordinate with the states.

[8] Section 227(e)(1) of the TCPA does state that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements." [Emphasis added] However, the ability of states to enact such laws is expressly subject to restrictions set forth in subsection (2) of Section 227(e).

the Commission to make clear through its rules that the TCPA already preempts state law with respect to interstate telemarketing.

In its request for comments last fall, the FCC identified a number of questions relating to the establishment of a national Do-Not-Call Registry.[9] Many of those questions, going back to the original TCPA order adopted a decade ago, have effectively been addressed by the last ten years' of experience and the actions by the FTC to establish a national Registry.

For example, in 1992, the FCC concluded that a national database would be costly and difficult to establish.[10] In fact, consistent with the recently enacted implementing legislation, the costs of the "do not call" provisions of the Amended TSR are estimated at $18.1 million for fiscal year 2003. Congress has appropriated upfront monies, to be recovered by fees for access to the Registry, which are being expended now. The costs, however, are on balance appropriate in light of the plethora of state do-not-call lists that are emerging and – significantly – the double cost involved should the FCC pursue its own Registry. As we noted above, the efficiencies and benefits to consumers, businesses and consumer protection authorities of the "one stop shop" that would be provided by a single national registry are significant.

In addition, the requirements enumerated in Section 227(c)(3) of the TCPA do not present an impediment to the FCC adopting a single, national Registry in conjunction with the FTC.[11] For those specific requirements related to common carriers, the FCC would still retain authority to meet those requirements. The more significant requirements laid out in Section 227(c)(3) related to the operation of the database have already been addressed through the FTC action. As to substantive conflicts between the FTC and FCC substantive approaches, those are identified in our comments below.

Seek Consistent Approaches with The FTC's TSR

As the Commission recognizes, in passing the *Do-Not-Call Act*, Congress mandated that the FCC issue its final rule in the above-captioned proceeding by September 7, 2003. The Act specifically provides that the FCC shall consult and coordinate with the FTC to maximize consistency with the amended TSR.[12] SIIA urges

[9] FCC NPRM, paras 49-66.
[10] See *TCPA Order*, 7 FCC Rcd at 8760, para. 14. At the time commenters then estimated that the start-up and operational costs for a national database in the first year ranged from $20 million to $80 million. *Id.* At 8758, para. 11.
[11] See FCC NPRM para. 53.
[12] *Do-Not-Call Act*, Section 4(a).

the FCC to carry out its mandate under this *Act* to maximize consistency and avoid unnecessary conflict with the amended TSR.

The FCC has identified several areas where potential conflicts exist. Among those that are of concern to SIIA are the following:

Do not adopt the FTC's approach to "Established Business Relationships" (EBRs) found in the TSR. While the FTC recognized the need to exempt pre-existing business-consumer relationships in the TSR, the **amended TSR includes an 18-month limitation** on prior relationships – even if they have existed for many years. For our industry, this would be arbitrary and punitive because upgrades of software and information products and services often occur on unique cycles, which are frequently as long as every three years. Consumers' purchases of new versions of software may occur, depending on usage and sophistication, over a range of years. Moreover, the digital content industry does not operate on a monthly subscription basis that would toll the start of the 18-month window. Rather, in our industry, payment is *upfront* before delivery of digital product or service. In short, an EBR based on artificial, temporal restrictions unfairly disadvantages certain types of companies, such as our members, that do not rely on installment payments or monthly billing.

In addition, we want to point out to the FCC that its current approach has seriously detrimental consequences, as well. As we understand it, in its *TCPA Order*, the FCC provided that a business may not make telephone solicitations to an existing or former customer who has asked to be placed on that *company's* do-not-call list.[13] The FCC should not incorporate this rule into a single, national approach to a Registry. This would create tremendous conflict with the FTC's approach and for some industries, such as software and information, by contravening the contractual licensing relationship that is inherent to our industry. Specifically, a user may not simply "terminate" a relationship with a software or information product developer. In most, if not all, cases, the "termination" must occur through the return of the product for the license to be canceled.

Do not adopt the FTC's approach to "Express Verifiable Authorization" found in the amended TSR. An additional practical problem surrounds the amended TSR's **treatment of "express verifiable authorization"** which allows use of a demand draft to pay for products and services. The amended TSR makes the express verifiable authorization requirement more onerous by: eliminating the option to obtain authorization by sending written confirmation of oral instructions; instead requiring oral authorizations to be tape-recorded and preserved, thereby adding to the existing requirements for obtaining and maintaining the recorded authorization; and expanding the types of transactions subject to the requirement to include any form of payment that does not have error resolution and liability protections "comparable" to the Fair Credit Billing Act ("FCBA") and Truth in Lending Act ("TILA").

[13] See *TCPA Order*, 7 FCC Rcd at 8770, n. 63 referenced at FCC NPRM para. 35.

Conclusion

SIIA appreciates this opportunity to respond for the first time to the FCC's Further Notice of Proposed Rulemaking. SIIA urges the FCC, working constructively with the FTC, to:

- Create a single national do-not-call registry that is a one-stop resource for consumers, businesses and consumer protection authorities that replaces and absorbs the operations of state do-not-call lists.

- Seek consistent substantive approaches with the FTC's amended TSR, taking into account the two areas in which the FCC should not acquiesce to the FTC's approach.

If you have any further questions, or need additional information, please do not hesitate to contact Mark Bohannon, SIIA's General Counsel & Senior Vice President, Public Policy at 202-789-4471 or mbohannon@siia.net or David Leduc, SIIA's Director of Public Policy at 202-789-4443 or dleduc@siia.net.